BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: DeSILVA GATES CONSTRUCTION P.O. Box 2909 Dublin, CA 94568 Employer	Docket No. 01-R2D2- 2742 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above-entitled matter by DeSilva Gates Construction [Employer] under submission, makes the following decision after reconsideration.

JURISDICTION

Commencing on April 5, 2001, a representative of the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by Employer at Highway 4, Segment 2, Hercules, California (the site). On July 3, 2001, the Division issued a citation to Employer alleging a serious violation of section[1] 1669(a) [personal fall protection], with a proposed civil penalty of $8,435.

Employer filed a timely appeal contesting the existence and classification of the alleged violation and the reasonableness of both the abatement requirements and proposed civil penalty.

On July 26, 2002 and April 11, 2003, hearings were held before Dennis M. Sullivan, Administrative Law Judge (ALJ), in Concord, California. Ron Medeiros, Attorney, represented Employer. Allyce Kimerling, Staff Counsel, represented the Division.

On April 24, 2003, the ALJ issued a decision denying Employer's appeal.

[1] Unless otherwise specified, all section references are to Title 8, California Code of Regulations.

On May 29, 2003, Employer filed a petition for reconsideration. The Division filed an answer on July 3, 2003. The Board took Employer's petition under submission on July 17, 2003.

EVIDENCE

The Board adopts the summary of evidence as contained on pages 2 through 8 of the decision of the ALJ dated April 24, 2003, attached hereto.

ISSUE

Did the Division establish a serious violation of section 1669(a) for which Employer was liable as a controlling employer pursuant to section 336.10(c)?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

Employer was cited as the "controlling employer"[2] for a serious violation of section 1669(a). Section 1669(a) provides:

> When work is performed from thrustouts or similar locations, such as trusses, beams, purlins, or plates of 4-inch nominal width, or greater, at elevations exceeding 15 feet above ground, water surface, or floor level below and where temporary guardrail protection is impracticable, employees shall be required to use approved personal fall protection system in accordance with Section 1670.

The citation particularly alleged:

> *Route 4 Seg 2: During installation of a platform atop a Mechanically Stabilized Earth (MSE) retaining wall, employees of Shasta Constructors, Inc. were exposed to falls in excess of 15 feet above the ground from plates of 4" nominal width while wearing no personal fall arrest, fall restraint or positioning systems in accordance with Section 1670. Desilva Gates Construction, Inc., the general contractor, shared responsibility with its subcontractor, Shasta*

[2] Section 336.10 provides in relevant part: "On multi-employer worksites … citations may be issued only to the following categories of employers when the Division has evidence that an employee was exposed to a hazard in violation of any requirement enforceable by the Division: (c) The employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite; *i.e.,* the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer) …."

Constructors, Inc., for safety and health conditions at the worksite by contract and through actual practice. Desilva Gates Construction, Inc. had the authority, but failed to protect its subcontractor's employees from visible fall hazards pursuant to Title 8 CCR section 336.10(c).

DeSilva Gates was the general contractor that hired Shasta Constructors to build a bridge or overpass on the project. On March 28, 2001, while Shasta was engaged in the construction of a temporary walkway along one edge of the bridge deck, Shasta's foreman, Richard Turley [Turley], fell approximately 20 feet to the ground below and sustained serious injuries. Employer does not dispute the fact that Turley and two other Shasta employees were not wearing personal fall protection systems and no other fall protection was provided at the time of Turley's accident. Instead, Employer claims it had no knowledge of the alleged violation. In its petition for reconsideration Employer "contends that the 'controlling' employer provisions of Title 8, CCR § 336.10(c) implies elements of **knowledge, reasonableness, and an actual ability (of the 'controlling' employer) to exercise control over a subcontractor**." [Employer's emphasis in original] The basis for this argument, according to Employer, is two-fold: (1) it lacked knowledge of safety orders affecting bridge building operations, and (2) it had not been present at the jobsite at the time, and for several days prior to the day, of the alleged violation.

Multi-Employer Liability

Employer entreats for an interpretation of the "controlling" employer's liability under section 336.10(c) which, it argues, should require that a cited employer have a "realistic ability" to detect hazardous conditions. Employer cites federal cases in support of this position.[3] At this point it is necessary to set the tone for the remainder of this decision after reconsideration which is that federal law does not control and does not preempt California's Occupational Safety and Health Act of 1973.[4] Employer correctly points out that section 336.10, the multi-employer worksite regulation, became operational on December 31, 1997 and that it was in response to Federal/OSHA's notice that California's occupational safety and health program was not as effective as the federal program because it failed to provide enforcement of standards at worksites having more than one employer present at the same time.[5] However, enacting the multi-employer worksite regulations in response to Fed/OSHA's notice does not make the specific requirements under the federal program binding on the State.[6] The State is required to only provide a program at least as effective as Fed/OSHA.[7]

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[3] *Marshall* v. *Knutson Const. Co.,* 566 F.2d 596 (8th Cir. 1977); *Electric Smith, Inc.,* v. *Secretary of Labor,* 666 F.2d 1267 (9th Cir. 1982).
[4] See *United Air Lines, Inc.* v. *Occupational Safety and Health Appeals Board* (1982) 32 Cal.3d 762.
[5] See *Airco Mechanical, Inc.,* Cal/OSHA App. 99-3140, Decision After Reconsideration (April 25, 2002).
[6] *United Airlines, Inc.* v. *Occupational Safety and Health Appeals Board, supra* fn 4.
[7] 29 U.S.C. section 667(c)(2).

By its terms, the applicability of section 336.10 is not conditioned upon a controlling employer's knowledge of the violation.[8] Lack of knowledge of a violative condition is a defense to a *serious* classification, not to a violation itself.[9] To inject into section 336.10(c) an interpretation that requires that a cited employer have a "realistic ability" to detect hazardous conditions as a necessary element of finding the controlling employer liable for the charged violation would lead to "unwieldy subjective enforcement."[10]

Employer argues that to hold it responsible for the conduct of Shasta's employees would expose it to strict liability. Employer says it is not an absolute guarantor of safe working conditions and "may not be exposed to an absolute liability for every event that occurs at a place of employment." Admittedly, Employer was not present at the site even though under the terms of its contract with Cal/TRANS it was required to have an authorized representative present at the site of the work at all times while work was actually in progress on the contract. Employer claims unfamiliarity with the safety requirements of bridge building and that is why it hired Shasta. The Board has had occasion to reject the "lack of knowledge" argument in connection with the strict liability theory. In *Strauss Construction Co., Inc.,*[11] the Board rejected the view that "to find a violation in the absence of knowledge is to improperly apply strict liability."

Section 336.10(c) defines the "controlling" employer as "[t]he employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite; *i.e.,* the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer)." The commands of the California Occupational Safety and Health Act of 1973 [Act] are to assure "safe and healthful working conditions for all California working men and women"[12] and to require that "[e]very employer shall furnish employment and a place of employment that is safe and healthful for the employees therein.[13]

Employer points out that it hired the subcontractor who employed the injured worker because of the subcontractor's expertise in bridge building. Employer claims it not only "lacked knowledge regarding the myriad of safety orders which affect bridge building operations … but was not (and had not been) present at the jobsite for several days prior to the day of the alleged

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[8] See *C. Overaa and Co.,* Cal/OSHA App. 01-3560, Decision After Reconsideration (April 1, 2004).
[9] *Id.*
[10] See *Douglas E. Barnhart, Inc.,* Cal/OSHA App. 99-180, Decision After Reconsideration (Sept. 19, 2001); see also *Obayashi Corp.,* Cal/OSHA App. 98-3674, Decision After Reconsideration (June 5, 2001) and *Traylor Bros., Inc./Frontier Kemper Construction, Inc., Joint Venture*, Cal/OSHA App. 98-2345, Decision After Reconsideration (June 12, 2002).
[11] Cal/OSHA App. 81-683, Decision After Reconsideration (Sept. 28, 1982).
[12] Labor Code section 6300
[13] *Id.* section 6400.

violation." Whatever Employer knew or didn't know about safety orders affecting bridge building, it had first hand knowledge of the commitment it made when it took on the Cal/Trans project of widening Route 4, including the necessary highway overpasses or bridges. The undisputed evidence disclosed that Cal/TRANS was the owner/construction manager of the project and that its Standard Specifications, dated July 1995, were incorporated into the contract between Cal/TRANS and De Silva Gates, the general contractor. A portion of those Standard Specifications was entered into evidence and that portion contained the following:

> No subcontractor will be recognized as such, and all persons engaged in the work of construction will be considered as employees of the Contractor and the Contractor will be held responsible for their work, which shall be subject to the provisions of the contract and specifications.[14]

Employer was a party in privity of contract with Cal/TRANS to widen Highway 4, including the construction of overpasses or bridges. How Employer decided to complete the bridge portion of the project was for it to decide. Here, it chose to employ Shasta Constructors for that purpose. Under the terms of its contract with Cal/TRANS it knew it was to be held responsible for Shasta's work and, under the terms of its own Code of Safe Practices in the section entitled "Subcontractor Safety Performance Requirements,"[15] Employer was to "suspend the related work immediately" upon discovery of any safety violation which may lead to a serious injury or death. Employer's foreman, Twitchell, testified that if subcontractor employees were observed committing safety order violations, depending upon the severity of the hazard or the failure of the subcontractor to correct the condition, he could order the work stopped until the condition was corrected. In addition, he testified that ultimately Employer could terminate the subcontractor's contract for noncompliance with safety performance standards.

Based on the above, Employer was responsible by contract for safety and health conditions at the site, and thus was a "controlling employer" under section 336.10(c).

Under The Public Works Contract With Cal/TRANS, Employer Cannot Shift its Responsibilities for Employee Safety to the Subcontractor

As discussed above, Employer was subject to being cited as a controlling employer under section 336.10(c) since it was responsible *by contract* with Cal/TRANS for the work of all persons engaged in construction at the worksite.

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[14] EXH. 11, Standard Specifications, July 1995 section 8-1.01
[15] EXH 8 at p. IX -10

Additionally, the work on this project was performed pursuant to a public works contract[16] for which additional considerations compel the conclusion that Employer, as a controlling employer in this case, cannot shift its responsibilities for health and safety of workers to its subcontractor under the subcontractor agreement.

In addition to Employer not providing evidence that it was not contractually required to correct Shasta's violation, no credible argument has been made that it didn't have the legal obligation to correct the violation. Employer's contract with Cal/TRANS was a public works contract and it contains language that "all persons engaged in the work of construction … [would] be considered [its] employees … [and Employer would] be held responsible for their work." Only De Silva Gates was in privity of contract with Cal/TRANS. Although De Silva Gates could choose qualified subcontractors as it saw fit to delegate work, it cannot delegate its responsibility to ensure a safe work place.

As the party in privity of contract with Cal/TRANS, Cal/TRANS and state enforcement personnel are entitled to look at De Silva Gates, the general contractor, to ensure that state laws are adhered to. The Board believes it would be contrary to public policy to allow a contractor to delegate its legal responsibility to a subcontractor or third party who has not entered into an agreement with the awarding body. The subcontractor is chosen by the contractor for the contractor's convenience. The Board holds that public policy requires that a general contractor holding itself out as competent to enter into a contract is capable of managing and supervising an entire project or at the very least has the financial wherewithal to hire a competent supervisor or outside construction management firm that has sufficient expertise to ensure compliance with the state's law. To hold otherwise would allow any public works general contractor without regard to past experience or present ability to be held unaccountable to the state and/or awarding body for the satisfactory performance and completion of the job which they contracted to do.

In order to reap the benefits of a contract with a governmental agency the contractor also carries the responsibility of that contract. The Board assumes that De Silva Gates bid on this project for the benefits that would accrue to the company as the successful bidder. If the Board were to allow De Silva Gates to reap the benefits of their bid without imposing upon them the responsibilities of being a successful bidder it would create an uneven playing field and unfair competition for those contractors who bid on the project with the idea that they

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[16] A "public works contract" is an "agreement for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind." [Public Contracts Code § 1101]. The contract is entered into between a public entity (or awarding body) and a contractor which generally follows a bidding and award procedure pursuant to the provisions of the Public Contracts Code sections 100, *et seq*.

would hire sufficient personnel to adequately supervise and monitor the project.

Employer also cannot insulate itself from liability for safety order violations for which it is responsible as the controlling employer by attempting to shift responsibility to its subcontractor by claiming it had no expertise in the field of work for which it hired the subcontractor. It is a long-standing principle of the Board that safety responsibility may not be shifted by virtue of agreements between employers,[17] or because the employer does not employ the employees,[18] or because the subcontractor removed guardrails the day after they were properly installed by the employer;[19] nor may an employer rely on third parties to fulfill its responsibility to provide for the safety of employees,[20] and an employer cannot be exempted from safety standards based on ignorance or *lack of expertise.*[21]

The Board's reading of the ALJ's decision indicates to the Board that the rest of Employer's contentions were made to, and adequately addressed by the ALJ. The Board therefore adopts the ALJ's decision and incorporates it by reference into this Decision After Reconsideration.

The Board finds that De Silva Gates was a "controlling" employer pursuant to section 336.10(c) by virtue of its contractual undertaking with Cal/TRANS which required it to be responsible for its subcontractor's work. Thus, the Board finds that the Division established a violation of section 1669(a) against Employer as a "controlling" employer pursuant to section 336.10(c). The Board also finds that the violation was properly classified as serious based on the testimony of the Compliance Officer which established a substantial probability of serious injury or death as a result of the violation, documentary evidence evaluating falls of 20 feet, and Employer's stipulation that Turley was seriously injured by the 20-foot fall.

DECISION AFTER RECONSIDERATION

A serious violation of section 1669(a) is established and a civil penalty of $8,435 is assessed.

CANDICE A. TRAEGER, Chairwoman
MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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[17] *Moran Constructors Co.,* Cal/OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975).
[18] *Zapata Diversified Builders,* Cal/OSHA App. 80-1059, Decision After Reconsideration (June 29, 1981).
[19] *Novo-Rados Constructors,* Cal/OSHA App. 78-135, Decision After Reconsideration (Apr. 28, 1983).
[20] *Manpower, Inc.,* Cal/OSHA App. 78-533, Decision After Reconsideration (Jan. 8, 1981).
[21] *Manpower,* Cal/OSHA App. 98-4158, Decision After Reconsideration (May 14, 2001).

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